

## MALAYSIAN REPORTS

KHONG KIM CHING v.  
HASSAN BIN DIN & ORS.[O.C.J. (Chang Min Tat J.) April 23, 1971]  
[Ipoh — Civil Suit No. 5 of 1971]

*Practice and Procedure — Specially indorsed writ — Whether claim founded on an allegation of fraud can be made by specially indorsed writ — Whether writ indorsed with claims contrary to R.S.C. 1957, O.3 r.6 a nullity.*

The plaintiff had originally issued a specially indorsed writ against the first six defendants for a declaration that an agreement in writing was binding and enforceable and for specific performance. Subsequently the plaintiff applied to add three further defendants and this application was granted. An amended writ was filed in the registry and from this it appeared that the particulars of claim endorsed contained allegations of fraud as founding the action against the added defendants. The three new defendants applied to set aside the writ on the ground that as the specially indorsed writ included a claim based on an allegation of fraud it was a nullity.

**Held:** (1) no claim founded on an allegation of fraud can be made by a specially indorsed writ and in so doing by their amendments, the plaintiff was in breach of a rule which expressly forbids such a practice;

(2) a specially indorsed writ which is indorsed with a statement of claim containing claims contrary to O. 3 r. 6 of the Rules of the Supreme Court is a nullity and not a curable irregularity.

**[Editorial Note:** This case was cited in *Lee Kim Man v. Chin Kon Sang*, ante p. 101. In this case the learned judge took considerable pains to compare the present O.3 r.6 with its predecessor.]

## Cases referred to:-

- (1) *Paxton v. Baird* [1893] 1 Q.B. 139.
- (2) *Gurney v. Small* [1891] 2 Q.B. 584.
- (3) *Inbert-Terry v. Carver* 34 Ch.D. 506.
- (4) *Arden v. Boyce* [1894] 1 Q.B. 796.
- (5) *Walker & Anor. v. Hicks* (1877-8) 3 Q.B.D. 8.
- (6) *Grant Advertising International Inc. & Anor. v. Glaze* [1968] 1 M.L.J. 31.
- (7) *Looi Guan Kway v. Low Lean Bok* [1938] M.L.J. 35.
- (8) *Grey v. Pearson* 6 H.L. Cases 61 at p. 106; 10 E.R. 1216 at p. 1234.
- (9) *Abley v. Dale* 11 C.B. 378 at p. 391; 139 E.R. 519 at 525.

## CIVIL SUIT.

G. *Moganasundram* for applicants (defendants 8 and 9).

N. T. *Rajah* for respondent (plaintiff).

Chin *Swee Onn* for defendants 1, 2, 3.

Y. C. *Chin* for defendant 7.

**Chang Min Tat J.:** This application by summons-in-chambers to set aside the specially indorsed writ of summons and all subsequent proceedings is made on the grounds that the writ was endorsed with a claim on an allegation of fraud contrary to Order 3 rule 6 of the Rules of the Supreme Court. It was made in the first place by defendants 8 and 9 and then by defendant 7, who by reason of late service came later into the picture.

For the proper understanding of this matter, it is necessary for me to review the course of events in this confused bit of litigation. The original writ, a specially indorsed writ, was issued against six defendants and the statement of claim endorsed thereon alleged an

A agreement in writing between defendants 1, 2 and 3 (the holders of a prospecting permit) and defendants 4, 5 and 6 (the assignors) the benefit of which with the knowledge of the permit-holders was assigned by a deed of assignment to the plaintiff. It further alleged that the permit-holders unilaterally repudiated the agreement, which, though not specified, would appear to be the agreement between the plaintiff and the permit-holders. The writ asked therefore for a declaration that the agreement was binding and enforceable between the parties and for specific performance. It also prayed for an injunction. The writ was sued out of this court on 8th January, 1971.

B An appearance was entered for defendants 1, 2 and 3 on 18th January, 1971. In the meantime an *ex parte* application for the injunction prayed for was turned down on 15th January, 1971, at which hearing, counsel appeared for defendants 1, 2 and 3, defendants 4 and 5 appeared in person and defendant 6 was absent, because he was not served.

C A further application was also turned down on 22nd January, 1971.

D On 29th January 1971, plaintiff filed an *inter partes* application to add 3 further defendants. The date 15th February, 1971 was endorsed on the summons-in-chambers as the date for hearing.

E In the meantime, the plaintiff made a third attempt at seeking an injunction. This application came before me, on a certificate of urgency, on 2nd February, 1971 and I was prevailed to make the order subject to the usual indemnity as to costs and until further order, with liberty to the defendants to apply. The injunction was made effective also against defendants 7, 8 and 9, though the application to add them as defendants had not been heard.

F On 15th February, 1971, I made an order adding defendants 8 and 9 to the action and in the absence of service on her, deferred the hearing in respect of defendant 7 to 8th March, 1971. On this date I made the order adding defendant 7 and set a time for the service of the amended writ.

G The amended writ was filed in the registry with commendable promptness on the same day as the order but it was clear from the orders sought that the particulars of the claim endorsed had to contain allegations of fraud as founding the action against these added defendants. The amendments, under Order 28 rule 2 Rules of the Supreme Court the plaintiff was of course entitled to make without leave, and opportunity was, correctly, taken to do so, so as to disclose a claim against the new defendants.

H They accused defendants 7, 8 and 9 of intentionally and knowingly procuring a breach of the agreement and with the permit-holders, of conspiring with one another to deprive the plaintiff of his rights under the assignment. They went on to allege that by fraud and misrepresentation of the permit-holders and defendants 7, 8 and 9, a sub-lease issued by the permit-holders and a sub-sub-lease issued by defendant 7 were registered on the Mining Title. Particulars of fraud were then given.

I On 9th March, 1971, defendants 8 and 9 entered a conditional appearance, and the next day made an

application to set aside the writ. Also on the same day, defendants 1, 2 and 3 entered similarly a conditional appearance to the amended writ. On 12th March, 1971, defendant 7 also entered a conditional appearance. The application by defendant 7 to set aside the writ was made on 18th March, 1971, but there did not appear to have been any such application by defendants 1, 2 and 3.

I pause here to remark that the conditional appearances entered by defendants 1, 2 and 3 were defective in that the usual endorsement to the effect that the appearance was to stand as unconditional unless the defendants apply within 10 days to set the writ aside and obtain an order to that effect, was not made thereon. Further, by reason of the absence of any application by defendants 1, 2 and 3, their appearance must now stand as unconditional. No appearance appeared to have been entered by defendants 4, 5 and 6 but whether they had been served or not is not clear as the plaintiff has failed at all times to file any affidavit of service or to secure the endorsement of service by the process-server on the sealed copy of the writ in the court-file.

The application of defendants 8 and 9 was heard on 15th March, 1971 and that of defendant 7 on 29th March, 1971.

It was contended by counsel for the applicants that the words of Order 3 rule 6 Rules of the Supreme Court

"6(1) In any action other than one which includes

- (a) a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage; or
- (b) a claim by the plaintiff based on an allegation of fraud, the writ of summons may, at the option of the plaintiff be specially endorsed with or accompanied by a statement of his claim."

are sufficiently clear to support their contention. The industry of counsel, of which there can be no doubt, has not revealed any case in point. I myself must confess to a failure to find any. The absence however of any case law may of course be due to the clear wording of the rule which would guarantee against its transgression and therefore against any High Court having to decide on the validity of a specially indorsed writ of summons embodying a claim based on an allegation of fraud.

The lack of case law led inevitably to reliance in support of the arguments for and against the applications on cases which did not have, with respect, much bearing on the contention. *Paxton v. Baird*,<sup>(1)</sup> on which Mr. Moganasundram relied was a case in which a defective generally endorsed writ was amended to comply with the then Order 3 rule 6 in force (it did not appear to have been realised that Order 3 rule 6 in our Rules of the Supreme Court is derived from an amendment in 1957 of a rule that was different in terms and in effect), by the deletion of the claim for interest so as to become a good specially indorsed writ, on which an application to sign judgment under Order 14 rule 1 could be allowed. In *Gurney v. Small*,<sup>(2)</sup> an application to sign judgment under Order 14 rule 1 made before an application to amend the writ by striking out an unliquidated demand was disallowed on the rationale that before a plaintiff could

avail himself of Order 14 rule 1 the writ of summons must be a good specially indorsed writ under Order 3 rule 6 at the time when the summons to sign judgment was taken out. In other words if as in *Paxton v. Baird*, the summons was taken out after the amendment was made, it would have succeeded.

In reply, Mr. Rajah for the plaintiff explained that subsequent knowledge had compelled him to amend a perfectly good specially indorsed writ of summons against defendants 1, 2, 3, 4, 5 and 6 to disclose a cause of action against defendants 7, 8 and 9 by including an allegation of fraud. He was generous enough to concede that fraud was outside the scope of Order 3 rule 6 but he nevertheless contended that even if he could not carry out his original intention of applying to sign final judgment under Order 14 rule 1 which he had and which he could have done against defendants 1, 2, 3, 4, 5 and 6, since the inclusion of the fraud would prevent such a move, the amendment on the indorsement did not render the writ a nullity. He based his arguments on the provisions of Order 14 rule 1(b), which reads

"(b) If on the hearing of any application under this Rule, it shall appear that any claim which could not have been specially indorsed under 0.3 r. 6 has been included in the indorsement on the writ, the Judge may, if he shall think fit, forthwith amend the indorsement by striking out such claim or may deal with the claim specially indorsed as if no other claim had been included in the indorsement and allow the action to proceed as respects the residue of the claim."

In my view the short answer to this submission on the part of Mr. Rajah is that allowing for the moment the contention that a judge may act in the proceedings by striking out a claim which could not be included in a specially indorsed writ, without an application on the part of the plaintiff (see, contra *Gurney v. Small*, *supra*), the deletion which I would have to make in terms of this sub-rule would have the practical effect of ruling out any cause of action against defendants 7, 8 and 9, from whom it is apparent on the pleadings the plaintiff is seeking his substantial reliefs.

But I am not unmindful of the implied submission of Mr. Rajah's that he does not, in view of the amendment, seek to sign final judgment under Order 14 rule 1. He readily conceded that he would fail if he were, impliedly so foolish, as to try. He himself supplied three authorities, *Inbert-Terry v. Carver*,<sup>(3)</sup> *Arden v. Boyce*<sup>(4)</sup> and *Walker & Anor. v. Hicks*<sup>(5)</sup> which showed in the first two cases that leave to sign judgment under Order 14 rule 1 where the writs were not good specially indorsed writs was refused and in the last case, the judgment that was signed was set aside. The point made in citing these three cases, as I understand it, is that nowhere was it stated that there was any necessity to convert the defective specially indorsed writ to a general writ, in other words, that the inclusion could not and did not make the writ a nullity. But it is equally true to say that in none of these three cases was the point taken whether the writs were a nullity.

What Mr. Rajah might have argued but did not is that in *Arden v. Boyce*, *supra*, while the Court of Appeal upheld the decision of the Divisional Court in refusing leave to enter judgment for possession of

premises as such a claim was in substance based on forfeiture and could not therefore come within the words of Order 3 rule 6, it did not upset the Divisional Court's decision to give leave to the landlord to enter judgment for the arrears of rent. This would argue for the contention that the writ was not considered a nullity. But again the report does not show that this point was at all taken in the courts and argued.

Mr. Rajah also contended that the court would always allow, if necessary upon terms, in the exercise of its discretion, the conversion of one form to another. He cited *Grant Advertising International Inc. & Anor. v. Glaze*<sup>(6)</sup> but the whole point of that case is the application made by the plaintiff to convert his specially indorsed writ, and not the resistance as in this case to the application to strike out on the contention that the writ was not a nullity. If there had been such an application to amend and provided that the applicant fulfilled the conditions laid down by Aitken J. in *Looi Guan Kway v. Low Lean Bok*<sup>(7)</sup> and adopted by my brother Raja Azlan Shah J. in *Grant's* case, *supra*, the court might perhaps be moved to grant the amendment. But there is, as Mr. Moganandram had pointed out, no such application and in the face of this intransigence on the part of the plaintiff it becomes unfortunately necessary for me to rule on the present application before me to strike out the writ.

There is, as had been noted by all concerned, no decision on the point whether the inclusion in a specially indorsed writ of summons of a claim not allowed by the wording of the rule renders the writ a nullity or an irregularity which can be cured. It is also to be noted that all the cases cited referred, in the first place, only to applications to sign final judgment under Order 14 rule 1 and were decided on whether the writ at the time of the application, was a good specially indorsed writ or not and in the second place, to a rule which had been substantially amended. These cases, except for certain expressions on the force and validity of rules of court, do not therefore appear to be strictly relevant. And on the question whether the proceeding was a nullity or an irregularity, the line separating the two classes is so thinly drawn that resort to the numerous authorities cannot be made with any confidence to determine on which side of the line a particular case, for which there is no precedence, falls.

I therefore take the view that the application before me remains to be decided on the proper construction of the particular rule, and I think I can approach the problem of construction in no better way than to compare the present Order 3 rule 6 with its predecessor. A note in the 1957 *Annual Practice* makes it clear that our Order 3 rule 6 Rules of the Supreme Court was the "Rules of the Supreme Court 1883, as amended by Rules of the Supreme Court January 1902, r.1, R.S.C. (No. 1) 1929, R.S.C. (No. 1) 1933, R.S.C. (No. 1) 1937 and R.S.C. (Special Indorsements and Trial without Pleadings) 1954." The earliest predecessor then was the rule in Rules of the Supreme Court 1883 and it is fortunate that there is in the Ipoh High Court Library a copy of the Rules of the Supreme Court 1883, though from the loss of its covers and certain pages it is impossible to give the year of issue. However from the mention of an Act in

the 10th and 11th year of the reign of George V, the year could not be earlier than 1920. The result is that the rule of 1883 as amended by Rules of the Supreme Court January 1902 r.1, is available, and it reads:

"6. In all actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising (A) upon a contract, express or implied (as for instance, on a bill of exchange, promissory note or cheque, or other simple contract debt); or (B) on a bond or contract under seal for payment of a liquidated amount of money; or (C) on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or (D) on a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand only; or (E) on a trust; or (F) in actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent or against persons claiming under such tenant, the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled. Such special indorsement shall be to the effect of such of the Forms in Appendix C, sec. IV, as shall be applicable to the case."

On a reading of this 1883 rule as amended in 1902, it is apparent that while the rule specified what claims could be specially indorsed, it did not specify what claims could not. Applying the principle that what the law does not forbid, it allows, there could under this rule be no question of nullity or even irregularity where a claim other than those specified was included in the specially indorsed writ. The only question that was relevant was whether in an application under Order 14 there was a good specially indorsed writ on which summary judgment could be given. For these reasons, in all pre-1902 cases and certainly in all those English cases cited to me, the question of validity did not arise because it could not be taken and the court could not rule on it where the question did not arise.

It is also not without significance that in the notes to this rule, under the rubric "Claims not capable of being included in a special indorsement" the comment of the learned editors reads as follows —

"No claim which could not by itself be made the subject of a special indorsement can be included thereon, or joined therewith. Its presence vitiates the special indorsement, though the court has now power to remedy the fault by amendment ... ignoring it (see O. 14 r. 1(b))."

The rule of 1883 as amended and cited above was subsequently rewritten and put into another form without substantially altering its purport and by Rules of the Supreme Court (No. 1) 1933, a new proviso was added:

"In all other actions in the King's Bench Division (except actions for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage and actions in which fraud is alleged by the plaintiff."

This proviso was described in the *Yearly Practice of the Supreme Court* for 1934 as a drastic enlargement and the note added that all King's Bench actions could now be launched by a specially indorsed writ except those enumerated in sub-rule (4) above.

This Order 3 rule 6 which had been described as a "gateway" to the summary procedure in Order 14 was further amended by Rules of the Supreme Court (No. 1) 1937 to include a new sub-paragraph 4A. In

the 1941 *Annual Practice* at page 15 there appears this note

"General effect of the amendments to the Rule — the specially indorsed writ may be used in every action in the King's Bench Division or a statement of claim may be delivered with the writ. In these circumstances a number of decisions relating to what might and what might not be the proper subject-matter of a special indorsement have lost much of their significance...."

There is therefore confirmation for my view that any pre-1902 decision cannot be of any significant relevance in deciding the post 1933 rule.

In this form the rule remained unchanged for a number of years until 1954 when a rule providing for special indorsements and trial without pleadings was made. This change is however of no relevance to the matter under decision.

In the 1956 *Annual Practice*, the rule Order 3 rule 6 was altered to include actions in the Chancery Division and the Queen's Bench Division, so that the generality of sub-rule (4) could be used to render unnecessary the permissiveness of the other provisions. For the first time then Order 3 rule 6 appeared in the form that we know it in our 1957 Rules of the Supreme Court.

The development of the rule 6 in Order 3 in my view must found the proposition that while pre-1933, what could be included in a specially indorsed writ was expressly stated with no ban except that by the wording of Order 14 only those claims that could be correctly included could avail themselves of the summary procedure in that rule, after 1932, at least in the King's Bench Division and after 1954 or 1955 in the Chancery Division as well, there was an expressed ban of what could not be included in this rule. The position in Malaya after 1956 was that of England after 1932 in the King's Bench and after 1954 or 1955 in the Chancery Division as well.

The problem before me is, as I have stated, one of construction and having regard to the changes in the rule, and applying the "golden rule" of construction that

"The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency but no further"

per Lord Wensleydale in *Grey v. Pearson*,<sup>(8)</sup> as perhaps modified by the caution expressed by Jervis C.J. in *Abley v. Dale*:<sup>(9)</sup>

"If the precise words used are plain and unambiguous in one judgment, we are bound to construe them in their ordinary senses even though it lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or we fancy we see an absurdity or manifest injustice from an adherence to their literal meaning."

I must come to the inevitable conclusion that no claim founded on an allegation of fraud can be made by a specially indorsed writ and that in so doing by their amendments, the plaintiff is in breach of a rule which expressly forbids such a practice. It is not merely non-compliance. It is a deliberate breach, and however regretful the result might be personally for the

A plaintiff, though of course that is not the end of the road for him, it should not be tolerated. As Mellor J. in *Walker & Anor. v. Hicks*, *supra*, had suggested:

"It seems to me very important to prevent any loose dealing with regard to the form of special indorsement."

B I must not be taken to mean that I dissent in any way from what Aitken J. had said in *Looi Guan Kway's* case, *supra*, about the strong tendency of courts to allow amendments, whenever such amendments can be made without injustice to the other side. I do not, and I trust my years on the Bench have shown that I fully subscribe to it. But the matter before me is not, as in that case or in *Grant's* case an application to amend. Aitken J. considered the belated application to amend was made *mala fide*. There is here not even C any application to me. It is nothing more or less a resistance to an application by the other side to strike out the offending writ on a justification of a breach of the rule, or if not on a justification, then on the implied suggestion that though the rule may have been offended, there is nothing wrong in it and certainly nothing which in the prospective abandonment D of any resort to the summary Order 14 procedure, necessarily calls for amendment. In view of this, neither *Looi Guan Kway's* case nor *Grant's* case is of any assistance to the plaintiff in his reply.

E Then it is said that to call it a breach is to use too strong a language and that it is nothing more than non-compliance. With respect I do not agree. It is surely not non-compliance. It is factually a breach.

F It is also said that though there was an intention to avail himself of the summary procedure in Order 14 in his original writ before the amendment, the plaintiff now realises that he cannot and he does not intend to make use of the summary procedure. In my view, such a suggestion does not answer the question whether the breach is a nullity or an irregularity that is curable.

G I find confirmation for my view in a consideration of the mechanics of amendment involved if an application to amend is made. The amended writ that was filed is not a writ specially indorsed or accompanied by a statement of claim. It is a writ indorsed with a statement of claim. To amend such a specially indorsed writ containing particulars of fraud contrary to Order 3 rule 6 in order to convert it to a general writ cannot be achieved by merely deleting the heading "Specially Indorsed" from the writ and from the statement of claim, the particulars of fraud as that process H will result in an indorsement of claim to a general writ that is not an indorsement but a statement of claim and in a statement of claim that cannot be indorsed or regarded as an indorsement of claim. It seems to me that where no effective conversion can be achieved on any application, if made, the conclusion must be that the specially indorsed writ which is indorsed with a statement of claim containing claims contrary to I Order 3 rule 6 is a nullity and not a curable irregularity.

In the result I therefore come to the conclusion that the objection is well-founded. There will be an order in terms of the summonses. Costs to the objectors.

*Order accordingly.*